



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO.486 OF 2013

GEORGE KINYANJUI MURIITHI.....PLAINTIFF

VERSUS

GRACE RODAH OSOME.....1ST DEFENDANT

MOLYN CREDIT LTD2ND DEFENDANT

LAND REGISTRAR NAKURU.....3RD DEFENDANT

ANNE WAMBUI MWANGI.....4TH DEFENDANT

JANET NELIMA NYUKURI5TH DEFENDANT

RULING

(Application for amendment of defence to include a counterclaim; application allowed).

1. The application before me is that dated 31 January 2019 filed by the 5th defendant pursuant to the provisions inter alia of Order 8 of the Civil Procedure Rules, and Section 100 of the Civil Procedure Act, Cap 21 Laws of Kenya. The applicant is seeking orders that she be allowed to amend her defence and file a counterclaim for purposes of seeking orders for eviction of the plaintiff from the property in dispute.

2. To put matters into context, this suit was commenced through a plaint which was filed on 31 July 2013 vide which the plaintiff averred that he was the lawful owner of the properties Njoro/Ngata Block 1/5104 and Njoro/Ngata Block 1/5105. The plot No. 5104 was developed with an incomplete 4 bedroom bungalow whereas the plot No. 5105 was not developed. On 14 June 2012, the plaintiff and 1st defendant entered into a sale agreement for the sale of both plots No. 5104 and 5105 at a consideration of Kshs. 5,600,000/=. The plaintiff avers that he was not fully paid and alleges that the 1st defendant proceeded to forge documents and transfer the two properties into her own name. She subsequently took a loan with the 2nd defendant and caused a charge to be registered against the plot No. 5104. The plot No. 5105 was sold to the 4th defendant who in turn sold it to the 5th defendant/applicant. The Land Registrar has been sued in the matter as the 3rd defendant. In the suit, the plaintiff contended that the 1st defendant never got a good title capable of being transferred to other persons and he asked for orders inter alia that the titles of the 1st, 4th and the 5th defendants be revoked.

3. The applicant filed defence on 4 September 2013 vide which she pleaded that she purchased the plot No. 5105 from the 4th defendant which money she fully paid. She stated that she took possession of the land and fenced it but that on 16 May 2013, the plaintiff encroached into it and uprooted her fencing posts and damaged the fencing wire. She averred that she is entitled to a declaration that she is the lawful owner of the plot No. 5105. I have seen that through this motion, the applicant wishes to include a counterclaim seeking orders for general damages against the plaintiff and vacant possession or eviction.

4. When the application came up for inter partes hearing, none of the other parties appeared in court and none had filed anything to oppose the motion. I have gone through motion and as I have outlined above, the applicant principally seeks to amend her defence so as to include a counterclaim. I do note that this is now a part-heard matter, the case having proceeded for hearing on 3 May 2018 when the plaintiff testified. The case was adjourned thereafter as his other witnesses were not present. The matter was subsequently listed for hearing on 9 July 2018 and 20 November 2018 but the plaintiff again did not avail his witnesses. It is now due for further hearing on 20 June 2019.

5. Order 8 Rule 3 does provide that the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

6. It will be seen from the above that amendments can be made at any stage of the proceedings and indeed, courts are generally liberal in allowing parties to amend. The general principle with regard to amendments is that they should be allowed if they will not occasion injustice to the other party. I can do no better than quote the oft cited dictum of O'Connor J, in the case of **Eastern Bakery vs Castelino (1958) EA 461** where the judge stated as follows at p462 :-

“It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: Tildesley v. Harper (10 (1878), 10 Ch. D. 393; Clarapede v. Commercial Union Association (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: Budding v. Murdoch (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: Ma Shwe Mya vs. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

7. A party needs to amend his/her pleadings at the earliest opportunity and it is certainly desirable that all amendments be sorted out before the matter commences for hearing so that all parties may be aware of what they are going to face at trial. It is difficult to see what injustice will be suffered by any party where the amendment is sought before commencement of trial for the other party can as well also amend his/her pleadings and no injustice is caused save probably for inconvenience and delay for which costs will suffice. But as the matter progresses, the higher the probability that there will be injustice to the other party, especially where the amendment sought is not superficial, say to correct the name of a party or the description of a property, but is substantive, going to the root of the matter in dispute or introducing a new cause of action and prayers.

8. In this case, the plaintiff has testified and the applicant now wishes to amend to include a counterclaim. If it is not that the plaintiff has not opposed this application, I may have been hard pressed to allow it. But as matters stand, the plaintiff does not seem averse to the motion being allowed otherwise he would have opposed it. That being the case, I have no reason not to allow the application. I allow it. The applicant may proceed to amend her defence within the next 7 days.

9. I make no orders as to costs.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 28th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

R. K. Langat holding brief for Mr. Orege for 5th defendants/applicant.

All other parties – Absent.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU